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No. 82-1679

In the Supreme Court of the United States

OCTOBER TERM, 1982

C. H. ALBERDING, PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, a corporation president who owned no stock in the corporation but exercised pervasive control over its operations, was an "employer" within the meaning of Section 3(d) of the Fair Labor Standards Act, 29 U.S.C. 203(d).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A23-A35) is reported at 695 F.2d 190. The memorandum ruling of the district court (Pet. App. A1-A15) is reported at 531 F. Supp. 923.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1983. The petition for a writ of certiorari was filed on April 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was the president of Sabine Irrigation Company, a Louisiana corporation engaged in the business of supplying water for the irrigation of rice fields (Pet. App. A3, A24-A25). Petitioner did not directly own stock in

Sabine, but he controlled many of Sabine's financial affairs and the operations of other related corporations through a central office in Tulsa, Oklahoma (*id.* at A4-A5, A11, A26, A31).[1]

Employees in the Tulsa office, who had worked for petitioner for many years, regularly performed services for Sabine, such as paying its bills, cutting and mailing payroll checks for its employees, maintaining its business records, deducting federal income tax and social security from its payroll, handling its insurance arrangements, ensuring that ad valorem taxes were paid on its property and filing its income tax returns (Pet. App. A7, A26-A27). Petitioner authorized numerous transfers of funds among his corporations, including Sabine (*id.* at A8-A9, A26-A27). An on-site manager supervised Sabine's day-to-day operations, but he was not empowered to deviate from the $2.00 per hour subminimum wage rate set by the Tulsa office for Sabine's employees, or to increase the company's workforce, or to write checks, even on the company's local bank account (*id.* at A26).

2. The Secretary of Labor brought this action in the United States District Court for the Western District of Louisiana under the Fair Labor Standards Act, 29 U.S.C. (& Supp. V) 201 *et seq.* (*"FLSA"*), to enjoin Sabine, petitioner and J. E. Scally, a vice president of Sabine, from violating the Act's minimum wage provisions and to compel

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[1]Petitioner and a co-venturer each purchased one-half of Sabine's stock in the early 1950s (Pet. App. A25). Petitioner transferred his stock in the early 1960s, but continued as corporate president (*ibid.*). Two other companies managed by petitioner in his capacity as president acquired 100% of Sabine's stock prior to 1976 (*id.* at A5, A25). Tucker Moore, petitioner's son-in-law, owned all the stock in those two corporations and worked for yet another corporation controlled and managed by petitioner (*ibid.*).

payment of back wages due their employees (Pet. App. A1-A2, A23). After trial, the district court held that "there can be no doubt" that petitioner, along with Sabine, was an employer within the meaning of the Fair Labor Standards Act because of his long-time status as president of Sabine and his exercise, through his employees in the Tulsa office, of "pervasive control over the business and financial affairs of Sabine Irrigation" (Pet. App. A10-A11).[2]

The court of appeals affirmed (Pet. App. A21-A35). The court reasoned that in deciding whether petitioner was an employer, "formalistic labels or common-law notions of the employment relationship" should be rejected in favor of review of "the totality of the circumstances, underscoring the economic realities of the irrigation workers' employment" (*id.* at A29). The court expressly rejected petitioner's contention that he could not be held accountable for FLSA infractions because he lacked an ownership interest in Sabine; the court reasoned that "neither the Act nor jurisprudence designates stock ownership in a corporate employer as the *sine qua non* of employer status where other forms of control of the employment relationship have been proven" (Pet. App. at A30). On the issue of petitioner's control of Sabine, the court of appeals held that the district court properly discounted petitioner's "self-serving disavowals of involvement in Sabine's operations"; to the contrary, the court of appeals found "substantial evidence of * * * authority, however indirect, over the conduct of Sabine's business, including all significant phases of its relationship with the irrigation personnel" (*id.* at A31). Accordingly, the court of appeals concluded that the district court's finding that petitioner was an employer was correct on the facts (*id.* at A28-A31).

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[2]The action against Scally was dismissed after trial (Pet. App. A17).

ARGUMENT

Petitioner contends (Pet. 6-10) that because he owned no stock in Sabine and did not directly manage its business,[3] the courts below erred in holding that he was an employer within the meaning of Section 3(d) of the Fair Labor Standards Act, 29 U.S.C. 203(d).[4] This contention, which involves no more than the fact-bound application of well-settled principles, is without merit and does not warrant further review.

In determining whether the evidence of petitioner's control over Sabine brought him within the FLSA's definition of an employer, the court of appeals correctly followed the uniform decisions of other courts of appeals and examined the "totality of the circumstances" concerning the economic reality of the employment relationship. See *Castillo* v. *Givens*, 704 F.2d 181, 188-192 (5th Cir. 1983); *Real* v. *Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 754-755 (9th Cir. 1979); *Hodgson* v. *Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237 (5th Cir. 1973), cert. denied, 414 U.S. 819 (1973). See also *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 730 (1947). The court correctly viewed petitioner's technical lack of ownership as merely one factor to be weighed in determining liability under the Act and rejected petitioner's contention that he could not be an employer unless he owned stock in Sabine or directly managed its operations. See *Falk* v. *Brennan*, 414 U.S. 190, 195

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[3]Petitioner asserts (Pet. 7) that he "never participated in the supervision of the company's operations." The district court found otherwise, and the court of appeals held that the finding was supported by the record. Petitioner's challenge to this factual finding does not warrant review by this Court.

[4]Section 6 of the FLSA, 29 U.S.C. (& Supp. V) 206, the Act's minimum wage provision, is specifically directed to "every employer," and Section 3(d), 29 U.S.C. 203(d), defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee * * *."

(1973); *Shultz* v. *Mack Farland & Sons Roofing Co.*, 413 F.2d 1296, 1300 (5th Cir. 1969); *Lenroot* v. *Interstate Bakeries Corp.*, 146 F.2d 325, 328 (8th Cir. 1945).

Contrary to petitioner's claim (Pet. 11), the determination that he was an employer within the meaning of the Act notwithstanding his lack of stock ownership does not conflict with the decision of any other court of appeals.[5] Petitioner's reliance (Pet. 7-8) on *Wirtz* v. *Pure Ice Co.*, 322 F.2d 259 (8th Cir. 1963), is misplaced. The defendant in *Pure Ice* was a mere investor who had "nothing to do" with any decisions affecting the wages and hours of the employees and who was totally oblivious to events at the workplace. *Id.* at 263. Obviously, that defendant's situation is readily distinguishable from petitioner's extensive involvement in the financial affairs and management of Sabine.[6]

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[5] *Shultz* v. *Mack Farland & Sons Roofing Co.*, 413 F.2d 1296 (5th Cir. 1969), cited by petitioner (Pet. 8), actually supports the holding of the court of appeals in this case and in fact was relied upon in the opinion below on the question of whether petitioner exercised sufficient, albeit indirect, control of Sabine to be regarded as an employer (Pet. App. A31). On the issue of stock ownership, *Mack Farland* merely indicates that ownership is but one factor among many to be considered when examining employment status under the FLSA.

[6] Petitioner's argument (Pet. 9-10) that Sabine was not a part of an "enterprise" with the various other corporations he owned or controlled is irrelevant to the issue of whether he was an employer of Sabine's employees. The activities of the other corporations are pertinent only insofar as their interrelationship and complex financial dealings, all under petitioner's direction, established his personal control over Sabine's affairs.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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